

A **ABDUL MANAF AHMAD**

v.

MOHD KAMIL DATUK HJ MOHD KASSIM

B COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
RAUS SHARIF JCA
ABU SAMAH NORDIN JCA
C [CIVIL APPEAL NO: S-02-1052-2004]
26 NOVEMBER 2008

CIVIL PROCEDURE: *Action - Damages claim for defamation and malicious falsehood - Whether action time-barred by Sabah Limitation Ordinance - Whether s. 18 Ordinance rendered limitation defence inapplicable*

TORT: *Defamation - Statements in police reports - Whether defence of absolute privilege available - Criminal Procedure Code, ss. 107, 112*

LIMITATION: *Defamation - Fraud - Whether fraudulent concealment on part of defendant preventing plaintiff's discovery of right of action - Whether defendant's mere silence or passiveness a fraudulent concealment - Whether affirmative act required on part of defendant - Sabah Limitation Ordinance (Cap. 72), s. 18*

F CIVIL PROCEDURE: *Pleadings - Fraud - Whether plea of fraud expressly pleaded with full particulars - Rules of the High Court 1980, O. 18 r. 12*

G The plaintiff and defendant were members of the Tawau Native Timber Co-operative Society. The society was managed by an administration committee called the Lembaga Jawatankuasa Pentadbir. The plaintiff was the society's honorary treasurer whilst the defendant was a member of the committee in question. A disagreement arose between the parties about the management of the business and affairs of the society. That led the defendant to lodge a police report against the plaintiff on an allegation of criminal breach of trust. The report was lodged on 29 July 1987. The plaintiff was arrested the same day and later released. After five years he was re-arrested only to be released again. Subsequently the police informed him that the case against him was closed. Then on 13 October 2000 the Public Prosecutor informed the plaintiff that he had decided not to act upon the

complaint. The plaintiff then filed an action against the defendant claiming damages for defamation and malicious falsehood. The learned judge dismissed the action on the defence of limitation. Hence, the plaintiff's appeal to the Court of Appeal. The main issue was whether the limitation period prescribed by the Sabah Limitation Ordinance (Cap 72) ('the Ordinance') was inapplicable by virtue of s. 18 of the same. The plaintiff argued that the defendant fraudulently concealed the fact that he lodged a police report against the plaintiff and made no mention of it at an annual general meeting of the society. In doing so, the defendant fraudulently kept from the plaintiff the knowledge of the latter's right to bring an action as stated in s. 18 of the Ordinance.

Held (dismissing the appeal)

Per Gopal Sri Ram JCA delivering the judgment of the court:

(1) Statements made in first information reports under s. 107 of the Criminal Procedure Code ('CPC') and in police statements made under s. 112 of the same are absolutely privileged for the purpose of the law of defamation (*Martin Rheinus v Sher Singh*). The court disagreed with the view expressed in *Hoe Thean Sun v Lim Tee Ken* that a defamatory statement in a police report is only protected by the defence of qualified privilege. Defamatory statements in police reports must attract the defence of absolute privilege for reasons of public policy. Actions against complainants who lodge police reports would only discourage the reporting of crimes to the police thereby placing the detection and punishment of crime at serious risk. The criminal law readily provides for a remedy against persons who make false police reports. (para 4)

(2) The defendant did not plead the defence of privilege and a court is duty bound to decide a case only on the points raised in the pleadings. Further, in an action for defamation not only must the defence of privilege be specifically pleaded, the facts and circumstances must also be stated showing how and why the occasion is privileged. As such, the only issue left for the court to decide was whether the plaintiff's claim was barred by limitation. (para 5)

- A (3) Items 11 and 20 of the Schedule to the Ordinance prescribe a time limit of one year in an action for defamation in libel or in malicious falsehood respectively. The facts showed that the plaintiff was well beyond the limitation prescribed by the Ordinance. (para 6)
- B (4) Section 18 of the Ordinance would require the defendant to have fraudulently kept from the plaintiff the knowledge of the latter's right to bring an action. In short, there must have been fraudulent suppression or concealment of material facts going to the plaintiff's right of action. The expression "fraud" includes equitable fraud, *ie*, unconscionable conduct on the part of the defendant. (para 8)
- C
- D (5) There must be some affirmative act designed to prevent, and which does prevent, the discovery of the cause of action. Mere silence or passiveness (there being no fiduciary relation or act of the party calculated to deceive or lull inquiries) is not fraudulent concealment (Rustomji on the *Law of Limitation and Adverse Possession* at p. 306). In the present case, there was no affirmative act on the part of the defendant designed to prevent the discovery of the right of action. The defendant merely remained silent at the annual general meeting in question. That was insufficient based on the authorities concerned. Firstly, the parties did not stand in a fiduciary position to each other. Secondly, there was no act on the part of the defendant to deceive or lull the plaintiff into making inquiries into the facts relevant to his right to bring an action for libel. (para 9)
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- F
- G (6) The plaintiff's argument that he was unaware of the identity of the person who had defamed him and could not therefore institute proceedings within the limitation period was without merit. Upon his arrest the plaintiff could have applied for and obtained from the police a copy of the first information report in the case. From it he could have readily ascertained that it was the defendant who had libeled him. On the facts, the plaintiff did not act with reasonable diligence in ascertaining the defendant's identity within the prescribed limitation period. In the absence of fraud on the part of the defendant, it was no answer to a plea of limitation for a plaintiff to say that he was unaware that he had a cause of action during the relevant period prescribed by the statute. (para 10)
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(7) The plaintiff should not be permitted to rely on s. 18 of the Ordinance by reason of the way he fashioned his pleaded case. It is a cardinal rule of pleadings that a plea of fraud must be expressly taken with full particulars. The court will not permit a litigant to raise or argue upon an unpleaded or unparticularised charge of fraud (O. 18 r. 12 of the Rules of the High Court 1980). In the present case, the plaintiff's pleaded case did not raise a charge of fraud to bring himself within the purview of s. 18 of the Ordinance. (para 11)

Bahasa Malaysia Translation Of Headnotes

Plaintif dan defendan adalah ahli-ahli koperasi yang dipanggil Tawau Native Timber Co-operative Society. Koperasi tersebut diurus oleh satu jawatankuasa pentadbiran yang dipanggil Lembaga Jawatankuasa Pentadbir. Plaintif merupakan bendahari kehormat koperasi sementara defendan adalah ahli jawatankuasa di atas. Pertikaian berbangkit di kalangan pihak-pihak mengenai pentadbiran halehwal koperasi serta perniagaannya, di mana ia membawa kepada defendan membuat satu laporan polis terhadap plaintif atas dakwaan pecah amanah jenayah. Laporan dibuat pada 29 Julai 1987. Akibatnya plaintif telah ditangkap pada hari sama tetapi telah dilepaskan kemudiannya. Lima tahun kemudian, plaintif telah ditangkap semula tetapi dilepaskan juga kemudiannya. Selepas itu, pihak polis memberitahu plaintif bahawa kes terhadapnya telah ditutup. Begitu juga, pada 13 Oktober 2000, Pendakwa Raya telah memberitahu plaintif bahawa beliau tidak berhasrat untuk bertindak atas aduan berkenaan. Berikutan itu, plaintif telah memfail tindakan terhadap defendan menuntut gantirugi kerana fitnah dan pemalsuan niat jahat. Yang arif hakim bagaimanapun menolak tuntutan setelah mengambilkira pembelaan had masa. Plaintif merayu ke Mahkamah Rayuan dan isu utama yang berbangkit adalah sama ada tempoh had masa seperti yang ditetapkan oleh Ordinan Had Masa Sabah (Cap 72) ('Ordinan') tidak terpakai berdasarkan peruntukan s. 18 Ordinan tersebut. Plaintif berhujah bahawa defendan telah secara fraud menyorok fakta bahawa beliau telah membuat laporan polis terhadap plaintif dan tidak menyentuh perkara tersebut dalam mesyuarat agung tahunan koperasi. Menurut plaintif, dengan berbuat demikian, defendan telah menyorok dari pengetahuan plaintif akan haknya untuk membawa tindakan selaras dengan peruntukan s. 18 Ordinan.

- A Diputuskan (menolak rayuan)**
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:
- B** (1) Kenyataan yang dibuat dalam laporan pertama atau first information report di bawah s. 107 Kanun Acara Jenayah dan dalam kenyataan kepada polis di bawah s. 112 KAJ adalah, bagi maksud undang-undang fitnah, dilindungi secara mutlak (*Martin Rheinus v. Sher Singh*). Mahkamah tidak bersetuju dengan pandangan seperti yang diutarakan dalam *Hoe Thean Sun v. Lim Tee Ken* bahawa suatu kenyataan fitnah di dalam laporan polis hanya dilindungi pembelaan perlindungan bersyarat. Kenyataan-kenyataan fitnah di dalam laporan polis seharusnya menarik pembelaan perlindungan mutlak atas alasan polisi awam. Sebarang tindakan terhadap pengadu-pengadu yang membuat laporan polis akan hanya menjejaskan kadar laporan jenayah kepada polis sekaligus menjejaskan pengesanan dan penghukuman jenayah. Undang-undang jenayah sudahpun mempunyai peruntukan untuk menangani mereka yang membuat laporan polis palsu.
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- D**
- E** (2) Defendan tidak memplid pembelaan perlindungan manakala mahkamah hanya bertanggung untuk memutuskan sesuatu kes itu berdasarkan perkara-perkara yang dibangkitkan di dalam pliding sahaja. Selain itu, dalam suatu tindakan fitnah, bukan sahaja soal pembelaan perlindungan perlu diplidkan secara khusus, fakta-fakta serta hal-halkeadaan yang wujud juga mesti dinyatakan bagi menunjukkan bagaimana dan kenapa keadaan tersebut dilindungi. Dengan itu, satu-satunya isu yang perlu diputuskan oleh mahkamah adalah sama ada tuntutan plaintif dihalang oleh had masa.
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- H** (3) Item 11 dan 20 Jadual kepada Ordinan menetapkan tempoh had masa satu tahun bagi mengambil tindakan fitnah libel ataupun pemalsuan jahat. Fakta menunjukkan bahawa plaintif berada jauh di luar had masa yang ditetapkan oleh Ordinan.
- I** (4) Di bawah s. 18 Ordinan, defendan perlu dibuktikan dengan secara fraud menyorok dari pengetahuan plaintif mengenai hak plaintif untuk membawa tindakan. Pendek kata, harus ada penyorokan atau ketidak-dedahan fakta material berkaitan dengan hak plaintif untuk membawa tindakan. Ungkapan “fraud” termasuklah fraud berekuiti, yakni kelakuan tidak berhati budi di pihak defendan.

- (5) Harus wujud suatu bentuk tindakan afirmatif yang bertujuan untuk menghalang, dan yang sememangnya telah menghalang, kesedaran tentang kausa tindakan. Sikap diam atau pasif semata-mata (dalam ketiadaan apa-apa hubungan atau perlakuan fidusiari untuk memperdaya atau menutup inkuiri) bukanlah penyorokan fraudulent (Rustomji on the *Law of Limitation and Adverse Possession* di ms 306). Dalam kes semasa, tidak terdapat tindakan afirmatif oleh defendan yang bertujuan menghalang kesedaran terhadap hak untuk bertindak. Defendan cuma berdiam diri di mesyuarat agung tahunan berkenaan. Itu adalah tidak mencukupi berdasarkan autoriti-autoriti yang ada. Pertama, pihak-pihak tidak berada dalam kedudukan fidusiari antara satu sama lain. Kedua, tidak wujud sebarang perbuatan oleh defendan untuk memperdaya atau menyekat plaintif dari membuat inkuiri ke atas fakta-fakta yang relevan kepada haknya untuk membawa tindakan libel. A
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- (6) Hujah plaintif bahawa beliau tidak menyedari tentang identiti orang yang memfitnahnya dan dengan itu tidak dapat memulakan prosiding dalam tempoh had masa adalah tidak bermerit. Sebaik beliau ditangkap plaintif boleh sahaja memohon dan memperoleh dari pihak polis salinan laporan pertama dalam kes ini. Dari laporan tersebut beliau tentu dapat memastikan bahawa defendanlah orangnya yang telah memfitnah beliau. Berdasarkan fakta, plaintif tidak bertindak dengan ketelitian yang munasabah untuk menentukan identiti defendan dalam tempoh had masa yang ditetapkan. Dalam ketiadaan fraud di pihak defendan, adalah tidak memadai untuk plaintif menjawab pembelaan had masa dengan hanya berkata bahawa dalam tempoh had masa yang ditetapkan oleh statut itu beliau tidak menyedari bahawa beliau mempunyai kausa tindakan. E
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- (7) Plaintif tidak boleh dibenarkan bergantung kepada s. 18 Ordinan disebabkan oleh cara beliau memplidkan kesnya. Adalah menjadi satu kaedah penting pliding bahawa suatu pli fraud hendaklah dibuat secara ekspres dengan menyatakan kesemua butiran-butirannya. Mahkamah tidak akan membenarkan seorang litigan untuk membangkitkan atau berhujah atas satu dakwaan fraud yang tidak diplid atau dibekalkan dengan butiran-butiran. (A. 18 k. 12 Kaedah-Kaedah Mahkamah Tinggi 1980). Dalam kes semasa, kes yang diplidkan plaintif tidak membangkitkan suatu dakwaan fraud bagi membawa beliau ke dalam lingkungan s. 18 Ordinan. H
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A Case(s) referred to:

- Ardikappa v. Kadappa* [1916] 36 IC 418 (**fol**)
Bapalal & Co v. V Krishnaswami Iyer AIR [1941] Mad 26 (**refd**)
Gunga Narain Gupta v. Tiluckram Chowdhry LR 15 IA 119 (**refd**)
Hj Mohamed Dom v. Sakiman [1955] 1 LNS 26 HC (**refd**)
B *Hoe Thean Sun & Anor v. Lim Tee Keng* [1999] 1 CLJ 187 HC (**nof foll**)
Kitchen v. Royal Air Forces Association & Ors [1958] 2 All ER 241 (**refd**)
Lalta Singh v. Muthur Upadhia ILR 6 Luck 374 (**refd**)
Lim Yoke Kong v. Sivapiran Sabapathy [1992] 4 CLJ 2219; [1992] 1 CLJ
(Rep) 184 SC (**refd**)
Martin Rheinus v. Sher Singh [1949] 1 LNS 49 (**fol**)
C *Stallworthy v. Geddis* [1909] 28 NZLR 366 (**refd**)
Ting Ling Kiew & Anor v. Tang Eng Iron Works Co Ltd [1992] 3 CLJ
1685; [1992] 1 CLJ (Rep) 331 SC (**refd**)

Legislation referred to:

- Criminal Procedure Code, ss. 107, 112
D Limitation Act 1953, s. 29
Rules of the High Court 1980, O. 18 r. 12
Limitation Ordinance (Cap 72) (Sabah), s. 18

Other source(s) referred to:

- E** *Law of Limitation and Adverse Possession*, 7th edn, p 306

For the plaintiff/appellant - Saiful Azian Mokhtar; M/s VK Liew & Partners
For the defendant/respondent - Mirdin Mamdin; M/s Chin Mirdin & Co

[Appeal from High Court, Tawau; Suit No: T(22)-2001]

F [Editor's note: See *Abdul Manaf Ahmad v. Mohd Kamil Datuk Hj Mohd*
Kassim [2004] 1 LNS 320.]

Reported by Usha Thiagarajah

G

JUDGMENT

Gopal Sri Ram JCA:

- H** [1] This is an interesting case. It has to do with the interpretation to be given to s. 18 of the Sabah Limitation Ordinance (Cap 72) in the context of an action for defamation and malicious falsehood. But first the facts.
- I** [2] The plaintiff and defendant are members of the Tawau Native Timber Co-operative Society ("the Society"). The affairs of the Society were managed by an administration committee called the Lembaga Jawatankuasa Pentadbir. In 1985, when the plaintiff was the Society's honorary treasurer and the defendant a member

of the committee in question there was disagreement between them about the management of the business and affairs of the Society. This led to the defendant lodging a police report against the plaintiff alleging criminal breach of trust. The report was lodged on 29 July 1987. Investigations commenced and the plaintiff was arrested on the same day. However, he was later released. Some five years later, in 1992, he was arrested again. Once again he was released. A few months later, he was informed by the police that the case against him had been closed. On 13 October 2000 the Public Prosecutor wrote to say that he had decided not to act upon the complaint. On 23 March 2001, the plaintiff issued writ and claimed damages for defamation and malicious falsehood. The defendant raised several defences including limitation. The learned judge who tried the case acceded to the limitation defence and dismissed the action. The plaintiff has now appealed to us.

[3] When this appeal was called on, the attention of counsel on both sides was drawn to the decision of the Court of Appeal of the Federated Malay States in *Martin Rheinus v. Sher Singh* [1949] 1 LNS 49, where it was held that a statement made by a person to a police officer in the course of police investigation is absolutely privileged. In the course of his judgment, Willan CJ referred, without any criticism, to the observation of the trial judge in that case as follows:

He [the trial judge] held, however, that the statement was absolutely privileged, and, after citing several Indian cases, decided 'that no distinction can be drawn between the privilege which must be accorded to an information given to a police officer under section 107 of the Criminal Procedure Code and to a statement recorded by a police officer under section 112.

[4] It is implicit from *Martin Rheinus v. Sher Singh* that both statements made in first information reports under s. 107 of the Criminal Procedure Code and in police statements made under s. 112 thereof are absolutely privileged for the purpose of the law of defamation. I consider this to be good law. And I find support for the view I take of the matter from the decision of several Indian cases including *Bapalal & Co. v. V. Krishnaswami Iyer* AIR [1941] Mad 26. That was a case in which a letter of complaint to the police by the defendant alleging that the plaintiff had committed a crime was held to be absolutely privileged and

- A therefore not actionable. By reason of what I have said thus far, I am unable to agree with the view expressed in *Hoe Thean Sun & Anor v. Lim Tee Keng* [1999] 1 CLJ 187, that a defamatory statement in a police report is only protected by the defence of qualified privilege. It is apparent from the report of that case that
- B the decision in *Martin Rheinus v. Sher Singh* was not brought to the attention of the High Court. There is no doubt that defamatory statements in police reports must attract the defence of absolute privilege for reasons of public policy. If actions can be brought against complainants who lodge police reports, then it
- C would discourage the reporting of crimes to the police thereby placing the detection and punishment of crime at serious risk. The criminal law readily provides for a remedy against persons who make false police reports.
- D [5] Learned counsel's response to the privilege point is that it was not taken by the defendant in its defence in the instant case. He argued that it was a matter for the defendant to plead the defence and that it was not open for this court to dismiss his client's appeal on an unpleaded defence. In my judgment the
- E point is well taken. It is settled that a court is duty bound to decide a case only on the points raised in the pleadings. See, *Haji Mohamed Dom v. Sakiman* [1955] 1 LNS 26. It is equally settled that in an action for defamation not only must the defence of privilege be specially pleaded, but the facts and circumstances
- F must also be stated showing how and why the occasion is privileged. See, *Stallworthy v. Geddis* [1909] 28 NZLR 366. Accordingly the only issue left for us to decide is whether the plaintiff's claim is barred by limitation.
- G [6] Here, the starting point is, of course, the Ordinance itself. It is based upon – indeed it is constructed in the same fashion as – the Indian Limitation Act 1908. In respect of libel, the relevant entry in the schedule to the Ordinance is Item 11 which prescribes a limit of one year to bring an action for compensation
- H for libel, with the time commencing from the date on which the libel was published. As for the claim for malicious falsehood, this is covered by Item 20 which refers to suits for “compensation for any malfeasance, misfeasance or nonfeasance independent of contract and not herein specially provided for” and prescribes a
- I time limit of one year from the date “when the malfeasance,

misfeasance or nonfeasance takes place.” It is common ground before us that if you apply either of these time limits, the plaintiff was clearly well beyond the limitation prescribed by the Ordinance. A

[7] Learned counsel for the plaintiff has however argued that the foregoing items of limitation do not apply to his client by reason of s. 18 of the Ordinance. The section reads: B

18. When any person having a right to institute a suit has by means of fraud been kept from the knowledge of such right or of the title on which it is founded, or where any document necessary to establish such right has been fraudulently concealed from him, the time limited for instituting a suit: C

(a) against the person guilty of the fraud or accessory thereto; or

(b) against any person claiming through him otherwise than in good faith and for a valuable consideration, D

shall be computed from the time when the fraud first became known to the person injuriously affected thereby or, in the case of the concealed document, when he first had the means of producing it or compelling its production. E

The argument here is that the defendant fraudulently concealed the fact that he had lodged a police report containing material defamatory of the plaintiff. Reliance is placed on the fact that there was an annual general meeting of the Society on 23 August 1987 at which the defendant made no mention of the fact that he had lodged the report on 29 July 1987 alleging that the plaintiff had embezzled RM200,000 from the Society’s coffers. Accordingly, the plaintiff was unaware of the facts that gave rise to his cause of action and hence could not bring an action within the time limited by Items 11 and 20 of the Ordinance. F G

[8] Now, what the section requires is that the defendant should have fraudulently kept from the plaintiff the knowledge of the latter’s right to bring an action. In short there must be fraudulent suppression or concealment of material facts going to the plaintiff’s right of action. In *Lim Yoke Kong v. Sivapiran Sabapathy* [1992] 4 CLJ 2219; [1992] 1 CLJ (Rep) 184, the Supreme Court held that the expression “fraud” appearing in the not dissimilarly constructed s. 29 of the Limitation Act 1953 included equitable fraud, that is to say, unconscionable conduct H I

A on the part of the defendant. In arriving at this conclusion Mohamed Azmi SCJ who delivered the judgment of the court agreed with and adopted the following view expressed by Lord Evershed MR in *Kitchen v. Royal Air Forces Association & Ors* [1958] 2 All ER 241:

B It is now clear, however, that the word 'fraud' in s. 26(b) of the Limitation Act 1939, is by no means limited to common law fraud or deceit. Equally, it is clear, having regard to the decision in *Beaman v. ARTS Ltd* [1949] 1 All ER 465, that no degree of moral turpitude is necessary to establish fraud within the section.

C What is covered by equitable fraud is a matter which Lord Hardwicke did not attempt to define two hundred years ago, and I certainly shall not attempt to do so now, but it is, I think, clear that the phrase covers conduct which, having regard to some special relationship between the two parties concerned, is an

D unconscionable thing for the one to do towards the other.

[9] Rustomji on the *Law of Limitation and Adverse Possession* 7th edn, a leading work on the subject, has this comment to make (at p. 306 of the text) on the Indian equipollent of s. 18 (*viz.*, s. 17 of the Limitation Act 1963):

E There must be some affirmative act designed to prevent, and which does prevent, the discovery of the cause of action. Mere silence or passiveness (there being no fiduciary relation or act of the party calculated to deceive or lull inquiries) is not fraudulent concealment.

F If you apply that to the present case, you will see that there was no affirmative act on the part of the defendant designed to prevent the discovery of the right of action. The defendant merely remained silent at the general meeting. On the authorities this is

G insufficient. In the first place the parties do not stand in a fiduciary position to each other. In the second place, there was no act on the part of the defendant to deceive or lull the plaintiff into making inquiries into the facts relevant to his right to bring an action for libel.

H [10] The plaintiff's argument that he was unaware of the identity of the person who had defamed him and could not therefore institute proceedings within the limitation period is equally without merit. Upon his arrest he could have applied for and obtained

I from the police a copy of the first information report in the case. From it he could have quite readily ascertained that it was the

defendant who had libelled him. The instant plaintiff did not therefore act with reasonable diligence in ascertaining the defendant's identity within the prescribed limitation period. It may be added that, absent fraud on the part of the defendant, it is no answer to a plea of limitation for a plaintiff to say that he was unaware that he had a cause of action during the relevant period prescribed by the statute. See, *Ardikappa v. Kadappa* [1916] 36 IC 418; *Lalta Singh v. Muthur Upadhia* ILR 6 Luck 374. That principle, in my judgment, applies with full force to the facts of the present instance.

[11] Quite apart from what I have said thus far, the plaintiff ought not, in my view, be permitted to rely on s. 18 by reason of the way he has fashioned his pleaded case. It is a cardinal rule of pleadings now housed in RHC O. 18 r. 12, that a plea of fraud must be expressly taken with full particulars so that a court will not permit a litigant to raise or argue upon an unpleaded or unparticularised charge of fraud. See, *Gunga Narain Gupta v. Tiluckram Chowdhry* LR 15 IA 119; *Ting Ling Kiew & Anor v. Tang Eng Iron Works Co Ltd* [1992] 3 CLJ 1685; [1992] 1 CLJ (Rep) 331. In the present instance, the plaintiff's pleaded case does not raise a charge of fraud at all to bring himself within the purview of s. 18 of the Ordinance. Accordingly, it is a point that is not fairly open to him to raise before us.

[12] For the reasons already given, it is my considered judgment that the learned judge was correct in dismissing the plaintiff's action as being barred by limitation. I would therefore dismiss the appeal. The plaintiff must pay the costs of this appeal to the defendant. The deposit in court shall be paid out to the defendant to account of his taxed costs. The orders of the High Court are affirmed.

[13] My learned brothers Raus Sharif and Abu Samah bin Nordin, JJCA have seen this judgment in draft and have expressed their agreement with it.

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